the suspect, the accused or the witness of the right to stand silent and of the right of counsel at all investigatory stages, we embark on an uncharted constitutional course which leaves no opportunity for deviation. Either it is or it is not. It is clear that here there is no stated law, no comfort of precedent. *Escobedo* restrictions will affect the FBI and other federal officers as much as they will state officers. This is not a case where the federal officers have been following a procedure for years through the authority of the Court's supervisory powers, so that it is now time that state officers caught up. Admonishment of the right of counsel has never been required in the United States or England; the admonishment of right to remain silent has served only the military [Uniform Code of Military Justice, 10 U. S. C. § 831], the State of Texas [Tex. Code Crim. P. art. 727] and in England [Judges' Rules, [1964] 1 All E. R. 237].

An analysis of the various leading cases, chronologically from 1936 with their effect upon law enforcement, the courts and the prosecuting attorney of the states warrants consideration here:

Voluntariness. (Beginning with *Brown* v. *Mississippi*, 297 U. S. 278 (1936), to date without enumerating each case.) Although reasoning may differ on individual cases, few will question the rule on voluntariness as applied to the "totality of circumstances" concept in relation to voluntariness. It is to be noted that it always has been understood that "voluntariness" does not mean necessarily "volunteered." *Watts* v. *Indiana*, 338 U. S. 410 (1948). State authorities in general would agree (with one or two exceptions) with the Supreme Court that on the facts, the cases should have been reversed. None of these cases typifies state cases, and, of course, all involve a rather sensational crime, generally murder [25 murders, 1 manslaughter, 1 narcotics case, 4 cases of rape and 2 robberies:

Robinson, *Massiah, Escobedo and Rationales for the Exclusion of Confessions*, 56 J. Crim. L., C. & P. S. 412, 425 (1965)].

Arrest, Search and Seizure. Since the full effect of *Wolf* v. *Colorado*, 338 U. S. 25 (1949), did not come to rest upon the states until *Mapp* v. *Ohio*, 367 U. S. 643 (1961), it is only the results of the latter case that are pertinent here. While police officers, as overburdened public servants, may like the facility of short cuts to investigation, the view that illegal methods, especially flagrant or purposeful violations of the Constitution, should be countenanced by the courts, cannot be defended. The concern, of course, lies with what is "reasonable grounds" and what is "probable cause." There may well be individual cases which would allow opinions to differ, but few would differ with those cases brought to the attention of the Supreme Court. More debate may center upon some of the interpretations of other appellate courts, state and federal. In *United States* v. *Ventresca*, 380 U. S. 102 (1965) and *Linkletter* v. *Walker*, 381 U. S. 618 (1965), the Court provides reasonableness for law enforcement, thus enabling them to perform with diligence. Naturally there is concern when a police officer, who is stated not to be held to the judgment of a "legal technician," is reproved for failing to exercise the judgment which only could be expected from a legal technician. This is true in cases before all courts, in particular the appellate courts with bare majorities. It may be discouraging, but law enforcement officers will continue to do their best, appreciating that generally the courts understand their predicament so that the exception is the rule.

Right to counsel at trial and appeal; transcripts. *Griffin* v. *Illinois*, 351 U. S. 12 (1956), *Hamilton* v. *Alabama*, 368 U. S. 52 (1961), *Gideon* v. *Wainwright*, 372 U. S. 335 (1963), *Douglas* v. *California*, 372 U. S. 353 (1963), *White* v. *Maryland*, 373 U. S. 59 (1963), and others involving right

to counsel at trial and appeal and to transcripts for appeal were not devastating; they directly concerned only a few states and the judicial process, as distinguished from the investigation-prosecution of crimes. Prosecuting attorneys and courts in the large majority of states were surprised at *Gideon,* not knowing beyond the confines of their own borders the practice in other states, and the *Hamilton* and *White* procedures also were foreign to them. For obvious reasons, defendants' demanding to try their cases without an attorney because of dispute with counsel is abhorred by courts and state counsel alike. Law enforcement officers were not affected directly by these decisions.

Other matters. Malloy v. *Hogan,* 378 U. S. 1 (1964): Again the impact was minimal. *Jackson* v. *Denno,* 378 U. S. 368 (1964): Although this decision affected several of our more heavily populated states, yet considering the country as a whole, it produced little change. Again, the direct impact was upon the state courts, not the prosecuting attorneys or law enforcement officers. *Griffin* v. *California,* 380 U. S. 609 (1965): Most prosecuting attorneys and courts were not even aware that this could be done. This procedure was prohibited by constitution, statute or court rule in at least 44 of the 50 states.

Differing from the foregoing, the determination of an absolute principle so unique as *Escobedo,* in any expanded interpretation, will forever frustrate the good law enforcement officer who tries to obey the rulings of this Court, only to find reasonable investigation methods subject to varying confusing findings on each of the principles associated with the *Dorado* interpretation of *Escobedo,* e.g., focus, investigatory stage, admonishment, custody, interrogation, statement-confession, etc.

B. The Effects of a Required Admonishment Will Inhibit the Interrogation of Criminal Suspects Without Benefit to the Innocent.

Will warning an individual of his right to remain silent and of his right to counsel preclude the needed confession? Frankly, no one knows and an empirical study is not possible. But, if the admonishment is without this effect, then, either it is being administered improperly or there is simply no reason for such a rule existing.

By assuming the posture of one accused (acknowledging the obvious limitations of this premise), namely his concern with discovery of the misdeed (if not other misdeeds) and his natural instinct for preserving freedom and life, it is possible to derive a valid answer. Consider his realization, having these innate anxieties, that the police know he is involved. Subjectively we know that misdeeds are not readily admitted. Some of the effects of a required admonishment include:

1.

Problems in the use of acceptable interrogation techniques already exist and to overcome the admonishment adds to that burden.

2.

Every confession will be tainted with the issue of waiver of counsel.

3.

The question then becomes: is waiver possible. If, in reply to an admonishment, the accused asks, "Should I get a lawyer? Why do I need a lawyer? What will a lawyer do for me? etc." Having reached this impasse, must the interrogator simply advise the accused to retain counsel and thereafter stop his attempt to learn the truth, or, is it

permissible for him now to proceed to convince the accused that he does not need an attorney? Can an accused ever effectively waive his right to counsel once he has mentioned, in response to a warning, that maybe he should have one? Thus, another issue to plague the courts is created.

4.

Admittedly, in the pretrial investigatory period which includes time for interrogation, the defendant is at a disadvantage. But in our system of justice this imbalance is adjusted by the rights of the defendant at trial: (a) that he need not be witness against himself; (b) that he is entitled to a unanimous verdict of his peers; (c) that he cannot be again brought to answer, once acquitted; (d) that he must be found guilty beyond a reasonable doubt. Furthermore, there is no right in the state to appeal and there is no discovery procedure to obtain from the defendant himself the names of witnesses, etc. No one would suggest that these trial protections be altered, but if the pretrial investigation, which must involve interrogation of suspects and witnesses (both of whom could or could not be culprits in the crime), is eliminated, then our system of justice must fail but for a concomitant revision in our form of trial. If the foundation of our system of justice is rocked, something must give way; the consequences may not be what this Court, any lawyer, or any citizen would want.

5.

The "fear" of admonishment is that it will benefit only the recidivist and the professional. The first offender and the Culombes, Fikeses, Haleys, Paynes or Recks will not be the beneficiaries. The innocent will take offense to the caution.

6.

Many of the restrictions upon law enforcement, albeit for the good of the individual, must of necessity greatly burden these men who are charged with the protection of the public. That the police officer is the subject of distrust is evidenced by (a) the detailed information required in affidavits to obtain warrants, (b) the required corroboration of informer information, and (c) the trend to accept the suspect's word over that of the police officer. And so, by establishing unworkable requirements do we not further undermine and demoralize the police officer, forcing him to "stretch the truth"? Consider the experience in England with the Judges' Rules:

> The Rules undoubtedly required the observance of a very high standard, and it may be a higher standard than the average policeman was in the first instant naturally inclined to adopt. It is difficult to say what extent the spirit of the Rules is infringed because, as I have said, *it is the general habit of the police never to admit to the slightest departure from correctness.* DEVLIN, THE CRIMINAL PROSECUTION IN ENGLAND 47 (1960). (Emphasis added.)

7.

Exculpatory statements also will not be easy to obtain, thereby inviting defendants to change their minds and perjure themselves on the stand.

8.

Will impossibility of performance force, not only the police to uncover loopholes but the prosecutor and the trial courts as well to pursue this path—objective looking to one side? Trial judges, both state and federal, as well as most appellate courts, in their sympathy with the law enforcement officers' plight, are inclined to encourage law enforcement officers to "avoid" the stringent requirements

of the rules. Is this not apparent in the California District Courts of Appeal application of their *Dorado* rule to those cases not yet considered final? [*E.g.*, Re No Interrogation, *People* v. *Clapper*, 233 A. C. A. 18, 43 Cal. Rptr. 105 (1965), *People* v. *Fork*, 233 A. C. A. 860, 43 Cal. Rptr. 804 (1965); Re Harmless Error, Exculpatory Statements or Admissions, *People* v. *Williams*, 235 A. C. A. 474, 45 Cal. Rptr. 427 (1965) (admitted theft but denied robbery), *People* v. *Cooper*, 234 A. C. A. 699, 44 Cal. Rptr. 483 (1965) (admitted he was chewing marijuana cigarette); Re No "Focus," *People* v. *Jones*, 232 A. C. A. 471, 42 Cal. Rptr. 714 (1965); Re No "Custody," *People* v. *Garrett*, 235 A. C. A. 155, 44 Cal. Rptr. 897 (1965); Re Type of Admonishment, *People* v. *Chaney*, 233 A. C. A. 75, 43 Cal. Rptr. 280 (1965).]

C. Confessions Have an Essential Role and They Satisfy a Useful Purpose in the Administration of Justice.

The fact that confessions are used extensively, as shown by the Appendix, may not necessarily demonstrate justification for their presence. Rationalization of all reason is possible. Despite this logic, an outline of a few of the reasons, without great detail as to "why" or "reason" for the "why," may be of assistance to the Court:

1.

Basically, crimes are covert by nature, and, zealous assertions to the contrary, many crimes are impossible to solve without a confession.

2.

Confessions are the prime source of other evidence. Even if it is possible to solve crimes in the "scientific police laboratory" (a misconception often perpetuated by the police themselves), the evidence that is analyzed often must

come from admissions: the existence of the gun and the location thereof, the location of an automobile (e.g., in an assault), etc. The doctrine of the fruit of the poisonous tree will make an inadmissible confession of even greater consequence.

3.

Critics claim the urgent need is for more and better police officers. Reality dictates that although there be the need, there never will be sufficient police officers to prevent incipient crime and to investigate the millions of crimes committed in the United States. The selection of crimes to be investigated merely will be reduced. Assuming the existence of the required unlimited financing, nevertheless there are not enough FBI-caliber men, with college, law school or other advanced training, available or attainable for the cop's beat. Even on that dark hypothesis, which has some remedy by way of actual training, a "college degree per se does not a good police officer make."

4.

There is a direct corollary between pleas of guilty and confessions. The Appendix data so indicates where such data is available. (The City of Baltimore is an exception which has had the experience wherein custom has put aside the jury trial.) This is even more obvious when a distinction is made of the term "confessions" by eliminating therefrom the "exculpatory statement." It has been said that if all defendants pleaded not guilty and demanded trial by jury, justice in the United States would come to an abrupt halt. Can there be any doubt that an increased call upon court and prosecution personnel and facilities, already overtaxed, would adversely affect the administration of justice in the United States? Although all of us advocate justice, whatever the pecuniary cost, idealism

Although the membership of this Court changes, there remains the need for relative stability of established principles. To foster second-guessing will be detrimental to an orderly society and to the administration of justice.

In the matters now before the Court, arguments have raged and will continue this pursuit until this Court finally resolves them. To further this debate be restatement thereof herein will serve no purpose. The difficulties which the California courts are experiencing with the cases which are not as yet "final" (that is, after conviction but in the process of appeal or subject to appeal, the time therefor not having expired) seem reason enough to consider the national effect upon the administration of justice, such as would make the California situation a mere skirmish. To cite all of the cases would be of no value, but to illustrate this point a *few* of the 1965 reversals of murder convictions (where the punishment was death or life imprisonment) on a *Dorado* interpretation of *Escobedo* are: California Supreme Court: *People* v. *Bostick*, 62 Cal. 2d 820, 402 P. 2d 529 (1965) (4 defendants); *People* v. *Davis*, 62 Cal. 2d 791, 402 P. 2d 142 (1965); *People* v. *Roberts*, 63 A. C. 79, 403 P. 2d 411 (1965); *People* v. *Lilliock*, 62 Cal. 2d 618, 401 P. 2d 4 (1965) (2 defendants); District Courts of Appeal: *People* v. *Benavidez*, 233 A. C. A. 346, 43 Cal. Rptr. 577 (1965); *People* v. *Reid*, 233 A. C. A. 184, 43 Cal. Rptr. 379 (1965). There are many others, including Dorado himself and the defendant, Stewart, now before the Court. Of course, these cases are a mere sampling of the overall effect of *Dorado*, much less what the effect would be were it given retroactive application.

The Appendix of this brief demonstrates, far more than any recitation of theories, the possible effect of a decision to make any *Escobedo* rule retroactive. Of course, if the suggestion for an advisory rule is adopted, no problem lies on this point.

As new rules of conduct are formulated by the Court upon new found constitutional principles, the requiring of retrospective application thereof will frustrate the administration of justice beyond comprehension. While courts may be required to exercise hindsight, police officers only can be expected to follow prospective rules.

III. TO GUIDE LAW ENFORCEMENT OFFICERS, AN ADVISORY STANDARD, AS DISTINGUISHED FROM AN EXCLUSIONARY RULE, SHOULD BE DEVISED.

The exclusionary rule is ineffective at best. It may well be harmful. Whether changes can occur, or will occur in a degree that change is possible, devolves around human nature more so than legal principles, except insofar as the latter is an integral part of the former. This is a fact that even the critics of law enforcement appreciate:

> A practical difficulty in enforcing the constitutional rights of prisoners is the small efficacy of sanctions against official misconduct. In practice, the exclusionary rule alone is available, and it has no direct disciplinary force. The rule is applied only at trial, or perhaps only on appeal, months after the case has been "solved" and after the credit for getting the confession has been duly shared by all concerned. Then disappointed officials can ascribe the blame to the state or federal courts. Only after such rare public disclosures as those in the *Whitmore* case will any discredit fall on the officers.
>
> The only effective way to establish a constitutional regime in the administration of criminal justice is for the administrative superiors of police and prosecutors to insist on it. Sutherland, *Crime and Confession*, 79 Harv. L. Rev. 21, 40 (1965).

And Professor Sutherland may well have stated that appellate judges are not inclined to reverse many cases for this reason as well. To add an even more unpopular com-

pulsory rule of exclusion will not serve the interests of the people, law-abiding and nonlaw-abiding alike, of whom police officers, prosecuting attorneys, state and federal judges and Justices of this Court are servants.

Has not the time arrived for all of these public servants to join with other members of the executive and legislative branches of government in working together toward improving justice? Can this not be accomplished by an advisory rule which provides for reasonable, workable requirements but which does not exclude from court, on the bases of technicalities, the evidence obtained by a police officer attempting in good faith to follow such a rule? There should be no cause for "stretching of the law" (if not of the imagination) by the police officer or the trial or appellate judge, in order to uphold a conviction which should be so upheld but for an unintentional violation of such rule by a police officer seeking to perform his duty. The Advance Sheets readily disclose the means used by the California District Courts of Appeal to evade the stringent *Dorado* rule. What course the police and the trial judges of that state may be pursuing is not known.

Would not the advised use of an exclusionary rule—if limited to the flagrant abuse, the obvious violation or the grossly negligent failure to abide with such a regulation—bring, more forcefully, any improper conduct to the attention of those who are in a position to discipline the recalcitrant? Thus, it would be possible to inaugurate a workable system of redress.

State and federal governments are engaged, at last, in asserting positive action toward the objective of effective and just administration of the criminal law. The needs are obvious, although in all instances the method to accomplish the specific need is not. Surely improvement of the judiciary, the prosecutorial office and the various law enforcement bodies can be made and will be made because of

the present awareness. The various federal programs are to be seen in the presidential message of March 8, 1965, the immediate products being the Law Enforcement Assistance Act and the National Crime Commission. Local governments and private associations, from state to city, are involved in the overall plan. The American Bar Association is now engaged in studies which plan uniformity of trial practices as a means to more efficient justice (Criminal Justice Project headed by Chief Judge J. Edward Lumbard, United States Court of Appeals for the Second Circuit). The International Association of Chiefs of Police, this amicus and other national groups who represent administrators of the criminal laws seek to make changes for the better. There is a revolution in sight. Through the leadership of this Court, much of this promotion has come to fruition.

Fifty states, which are much like fifty countries, with their history of politics, the cultural differences of their ethnic groups and the myriad of other factors which have made them distinct, cannot be welded into a uniform mass overnight. With a national credo, uniformity in administration should be sought insofar as it can be sought. Of course, with human beings in charge perfection can only be a goal. This is not a pessimistic outlook, but rather it is optimistic that such a goal should be set at all.

But, to place, before all else, the opinion that the change must occur immediately by way of a dogmatic exclusionary rule may well frustrate the hoped-for objectives. The exigencies are time and study. The standard of justice in this country is not such that we cannot afford to stay changes, if the foreseeable results are more productive. An advisory rule, in the manner of *Wolf* v. *Colorado*, 338 U. S. 25 (1949) (which, because the times were different, did not precipitate the action warranted), will certainly be heeded now. It will give time to implement and still lead the way.

As we have throughout our entire legal history, we can look to England for the wisdom of experience. There, the formation of the Judges' Rules came at the request of police officers for guidance. While, as has been previously noted, the police of that country do not always adhere to the letter, the Rules are effectual because of the unique rapport between the courts and the police, an example to be encouraged in this country. The advisory Judges' Rules have some workable qualities which would not frustrate the enforcement of our laws. The indulgence of the Court in this suggestion is respectfully requested.

CONCLUSION.

Amicus curiae requests that the Court limit *Escobedo* v. *Illinois*, 378 U. S. 478 (1964), to its facts and that the rule in *Escobedo* be prospective only, in the form of an advisory rule to guide the administrators of our criminal laws.

For these reasons the decision in *California* v. *Stewart* should be reversed and the decisions in *Miranda* v. *Arizona*, *Vignera* v. *New York* and *Johnson* v. *New Jersey* should be affirmed.

Respectfully submitted,

DUANE R. NEDRUD,
Executive Director, National District Attorneys Association,
1155 East 60th Street,
Chicago, Illinois 60637,

MARGUERITE D. OBERTO,
Assistant Executive Director,
Counsel for the National District Attorneys Association, Amicus Curiae.